IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 56295-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MEKHRON SOBIR,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 31, 2006
	)	
	)	

PER CURIAM – Mekhron Sobir challenges his convictions of fourth degree assault, unlawful imprisonment, and interfering with domestic violence reporting, arguing that the trial court failed to properly instruct the jury and erred in denying his motion to prohibit the State and its witnesses from using the word "victim." Because the instructions were proper and the trial court did not abuse its discretion in denying his motion for a new trial based on the use of the word "victim," we disagree and affirm.

Late in the evening on October 27, 2004, as Liana Gonzalez parked her car near her apartment and opened the door to get out, her ex-boyfriend Mekhron Sobir approached her car and confronted her. Based on the ensuing events, the State charged Sobir with felony harassment, fourth degree assault, unlawful imprisonment and interfering with domestic violence reporting.

Gonzalez testified at trial that she believed Sobir had been drinking and smelled his breath when he told her to move over and give him her keys. When she refused, he pushed her and pulled her by her hair, forced her into the passenger seat, choked her and threatened to kill her. Gonzalez tried to yell for help, but he covered her mouth. When he continued to demand her keys, Gonzalez threw them out the passenger door because she was afraid he would drive somewhere while drunk and try to kill her. She managed to get out of the car and call 911 on her cell phone. When Sobir grabbed her cell phone from her, she ran to her apartment where she called 911. While she was speaking to the 911 operator, Gonzalez heard Sobir throw her cell phone against the door.

Sobir testified that he approached Gonzalez that night to tell her that he had contacted the Department of Social and Health Services to report her for fraud. In response, Gonzalez moved into the passenger seat and asked him to get into the car so they could talk. While they sat in the car, Gonzalez asked him to withdraw his complaint, offered him money and then cried in an attempt to convince him. When he refused, Gonzalez took out her cell phone and said she would call the police and report him for harassment and assault. Fearing she would make a false report, Sobir grabbed her phone. When she said she would scream and opened the door, Sobir tried to close the door and accidentally trapped her leg in the car. Then as Gonzalez got out of the car and went to her apartment, he followed her and attempted to return her cell phone, which he eventually left outside her apartment door.

Following trial, the jury found Sobir guilty of the assault, unlawful imprisonment, and interfering with reporting domestic violence, but not guilty on the felony harassment charge. Sobir appeals.

JURY INSTRUCTION

Sobir first argues that the trial court failed to instruct the jury on all the essential elements of the offense of interfering with domestic violence reporting. We disagree.

We review challenges to jury instructions de novo.[1] Jury instructions must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.[2]

The crime of interfering with the reporting domestic violence is defined in RCW 9A.36.150, which provides:

> (1) A person commits the crime of interfering with the reporting of domestic violence if the person:
> (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
> (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.
> (2) Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.
> (3) Interference with the reporting of domestic violence is a gross misdemeanor.

Here, the trial court provided the following two instructions:

> A person commits the crime of interfering with the reporting of domestic violence if the person commits a crime of domestic violence and

[1] State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).
[2] State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

Assault in the fourth degree is a crime of domestic violence when committed by one family or household member against another.[3]

To convict the defendant of the crime of interference with the reporting of a domestic violence offense as charged in count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 27, 2004, the defendant committed the crime of Assault in the Fourth Degree against Liana Maria Gonzalez Navarro as charged in Count 2;

(2) That on that date the defendant was a family or household member of Liana Maria Gonzalez Navarro;

(3) That the defendant prevented or attempted to prevent Liana Maria Gonzalez Navarro from calling a 911 emergency communication system; and

(3) [sic] That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count 4.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it is your duty to return a verdict of not guilty as to count 4.[4]

This instruction properly includes all the essential elements of the crime of interfering with the reporting of domestic violence.

Relying on State v. Clowes,[5] Sobir argues that the "to convict" instruction failed to state that commission of a distinct, underlying crime of domestic violence must be followed by a second, distinct act of interfering or attempting to interfere with the reporting of that act. In Clowes,[6] this court held that an information charging interfering with reporting domestic violence that did not

[3] Jury Instruction No. 15.
[4] Jury Instruction No. 16.
[5] 104 Wn. App. 935, 18 P.3d 596 (2001).
[6] 104 Wn. App. at 942.

refer to the identity of the victim or to the underlying domestic violence crime lacked essential elements. But here, the instruction clearly identified the victim as Gonzalez, listed the underlying crime of domestic violence as fourth degree assault, and required the jury to find that Sobir also prevented or attempted to prevent her from calling 911.

Essentially, Sobir argues that the prosecutor's statement that the act of grabbing the cell phone could constitute an assault produced an error in the instructions, because they failed to explicitly prevent the jury from convicting Sobir of the interfering charge based solely on the act of grabbing the phone. We disagree.

In closing argument, the prosecutor reviewed the "to convict" instruction and urged the jury:

> [F]irst, you must decide if the defendant's guilty of count two, the assault. If you think that the defendant didn't offensively touch her, then the State has not proved that element and you can't find him guilty of this particular offense. So that assault is a precursor to this last charge. So it makes sense, of course, to consider the assault first.[7]

Later in the argument, the prosecutor reviewed the testimony of certain witnesses and continued with the defendant's testimony:

> We also have -- and we don't have to have this, because the defendant doesn't have to present evidence if he doesn't want to. But in this case, the defendant chose to take the stand, so you get to consider everything that he said. Obviously a lot of times when people say things, it doesn't always help them. But you get to consider what he said for good or for bad.
>
> The one thing I'd like to point out is, look at all the stuff that he agreed with. Look at what he agreed to. He agreed he was at the scene, so he puts himself at the location of the events. He agrees that he was in

[7] Report of Proceedings (Mar. 10, 2005) at 43-44.

> the car. He agrees that he took her cell phone. He snatched it out of her hand.
>
> I would also submit to you that not only can you be assaulted by getting slapped, choked, punched, if somebody came up to you and snatched your cell phone out of your hand, that, too, is an assault. Those are all part of the same course of conduct, so you can consider all of those.
>
> But he admitted to snatching her cell phone right out of her hand because she was attempting to call 911. So that's right out of the defendant's own mouth.
>
> He also admitted that he reached across Ms. Gonzalez to pull the door shut to prevent her from getting out. That came right out of the defendant's own mouth. He also admitted that she was screaming for help. He admitted that she ran up to some people outside and was asking for help and said he's got my cell phone. Now, he wouldn't admit that she was asking them to call 911, but he admitted that she ran up to those people.
>
> He also admits that she ran up to her apartment, ran inside and shut the door, and he also admits that he still had the cell phone that he took from her when he went up to the apartment door.[8]

In light of the evidence presented at trial, no reasonable reading of the jury instructions as a whole could have allowed the jury to find Sobir guilty of both the assault charge and the interfering charge based on the single act of grabbing the cell phone. Gonzalez testified that Sobir interfered with her attempt to call 911 *after* he pushed her, pulled her hair and choked her in order to report the assaultive behavior that he had actually begun, if not completed. To the extent the jury believed Gonzalez, it could convict Sobir of interfering with reporting domestic violence regardless of whether grabbing the telephone constituted an additional assault.

If the jury believed Sobir's testimony and rejected Gonzalez's testimony, it would not have convicted him of interfering with reporting domestic violence,

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[8] Report of Proceedings (Mar. 10, 2005) at 50-52.

again, regardless of whether the act of grabbing the phone constituted an assault. Sobir testified that he grabbed Gonzalez's telephone because she said she was calling to make a false report against him. But the instruction defining interfering with the reporting of domestic violence clearly states that the crime occurs when a person prevents a *victim* or *witness* to a domestic violence crime from calling 911. To the extent the jury believed Sobir, Gonzales was neither a victim nor witness to any domestic violence crime at the time Sobir grabbed the telephone.

MOTION FOR NEW TRIAL

Sobir also argues that he was denied a fair trial because the trial court denied his motion to require the State and its witnesses to refer to Gonzalez as the "complainant" or the "alleged victim" rather than the "victim," which he contends, allowed the witnesses and the prosecutor to express an opinion as to his guilt. We will not overturn a trial court's ruling on a motion for a new trial absent abuse of discretion.[9] There was no such abuse here.

In denying the motion, the trial court noted that Sobir provided no authority that the use of the word victim "is uniquely prejudicial over and above the evidence presented by the State against the defendant in this trial," and noted that he failed to object to the admission of a document produced by a police officer that used the term "victim" repeatedly.

Relying on a Delaware case, Jackson v. State,[10] Sobir argues that in a

[9] State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).
[10] 600 A.2d 21 (Del. 1991).

case where the defense is general denial or that the allegations of the defendant's conduct are incorrect or not credible, use of the term "victim" violates the presumption of innocence. Jackson addressed the use of the term "victim" in a first degree unlawful sexual intercourse where the there was a dispute whether the intercourse was consensual. The Supreme Court of Delaware held that "the term should be avoided in the questioning of witnesses in situations where consent is an issue,"[11] but did not overturn the conviction because the use of the term did not constitute plain error and there was no objection at trial. The Delaware court has since stated that the statement in Jackson regarding use of the term was limited to rape cases where consent is the sole defense.[12]

Here, the term "victim" appeared in the jury instructions as well as the police document admitted into evidence without objection. Thus, the use of the term by prosecutor and the witnesses was often in reference to the instructions or evidence. In light of the jury instructions that the jurors are presumed to follow regarding presumption of innocence, reasonable doubt, and the difference between attorney argument and evidence, Sobir fails to demonstrate that he was prejudiced by the term or that the trial court abused its discretion in denying his motion for a new trial.[13]

STATEMENT OF ADDITIONAL GROUNDS

[11] 600 A.2d at 25.

[12] Allen v. State, 644 A.2d 982, 983 n.1 (Del. 1994).

[13] State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996); State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

In his statement of additional grounds for review, Sobir claims he was denied a fair trial based on two incidents of prosecutorial misconduct. Neither is persuasive.

First he contends that the prosecutor attempted to bolster Gonzalez's credibility and sway the jury with sympathy by stating, "Ms. Gonzalez, that was an awful long time to wait for the police under those circumstances." Because Sobir did not object to this statement at trial, he must demonstrate that the comment was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.[14] Sobir fails to argue or demonstrate that any remote prejudice from this remark could not have been cured by an instruction to the jury.

Secondly, Sobir contends that the prosecutor vouched for Gonzalez's credibility by repeatedly questioning Officer Shipley about an out-of-court conversation to undermine his testimony regarding matters that contradicted Gonzalez's testimony. Again, because he did not object at trial and fails to demonstrate any prejudice that could not be cured by an instruction, Sobir fails to establish reversible error.

We affirm the judgment and sentence.

For the Court:

Cox, J.

[14] See, e.g., State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).

Coleman, J.

Baker, J.